Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-686

LUTHER G. POWER, JR.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

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IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

LUTHER G. POWER, JR.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Petitioner, LUTHER G. POWER, JR., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on April 18, 1979 and of the Order overruling Plaintiff's Motion for Rehearing entered in this proceeding on June 29, 1979.

OPINIONS BELOW

The opinion of the Court of Claims, not yet reported, appears in Appendix A hereto. The opinion of the Court of Claims on Defendant's Motion and Plaintiff's Cross Motion for Summary Judgment is reported at 531 F.2d 505 (Ct. Cl. 1976). The opinion of the Court of Claims denying Respondent's Motion for Rehearing is reported at 210 Ct.Cl. 742 (1976).

JURISDICTION

The judgment of the Court of Claims was entered on April 18, 1979 and the Order overruling Plaintiff's Motion for Rehearing was entered on June 29, 1979. This Petition for Certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1255(1).

QUESTIONS PRESENTED

1. May an appointed career civil service employee's right to receive the pay of his office terminate after a determination by the Court of Claims that his removal was invalid before he has been validly removed or retired?

2. May the backpay award to a validly appointed civil service employee, whose removal from his position was determined to be invalid, be reduced by an amount that he might have earned by seeking other employment without any evidence that he could have obtained other employment or of the amount he would have earned from such employment?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 1491:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or

implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.* * * To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the Unites States.* * * "

5 U.S.C. Section 5596(b):

* * *(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee --

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to

his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.* * *"

STATEMENT OF THE CASE

On December 20, 1967, the Petitioner was appointed to a competitive, career civil service position in the Department of the Army as an Ammunitions Inspector (Surveillance). His initial appointment was a Grade GS-5. He continued to serve in this position and continued to receive promotions and ultimately achieved the grade of GS-9, Step 4 on January 9, 1972. He was removed from his position effective September 18, 1972 upon allegations relating to the submission of a claim for allowances in connection with a transfer from Fort Wingate Army Depot, Callup, New Mexico to Red River Army Depot, Texarkana, Texas. Following Petitioner's removal in 1972, he prosecuted an administrative appeal.

On April 5, 1974, the Board of Appeals and Review acting for the Civil Service Commission, upheld Petitioner's removal.[1] Having exhausted his administrative appeal, the Petitioner filed suit in the Court of Claims on December 23, 1974 seeking a judgment for backpay from September 18, 1972 and for reinstatement in the position from which he was involuntarily removed.

On March 17, 1976 the Court entered a judgment for the Petitioner.[2] The Court held that the penalty of removal which the Department of the Army, with the approval of the Civil Service Commission, assessed against the Plaintiff "was so unconsciounably disproportionate as to be an abuse of discretion by Defendant".[3] The Court further

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[1]In the Matter of Luther G. Power, Jr., Board of Appeals and Review Decision, April 5, 1974. Appendix E at E-1.

[2]Power v. United States, 531 F.2d 505 (Ct.Cl. 1976). Appendix A at A-1.

[3]Ibid., p. 507. Appendix A at A-5.

held that "we have determined not to order reinstatement in this action in the light of the unusual nature of this case".[4] Finally, the Court remanded this case to the Trial Division for further proceedings under Rule 131(c), Court of Claims Rules to determine the amount to be awarded Petitioner, consistent with its opinion.

On May 5, 1976, Respondent filed a Motion for Rehearing in the case and the Court denied the Respondent's Motion in an Order dated June 25, 1976.[5]

The Trial Judge recommended a finding that the Petitioner's right to receive pay terminated on the date of the Court's decision on March 17, 1976. He further recommended a finding that Respondent was

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[4]Ibid., p. 510. Appendix C at C-16.

[5]Power v. United States, 210 Ct.Cl. 742 (1976). Appendix D at D-1.

entitled to an offset from the backpay award for amounts that Petitioner might have earned had he exerted reasonable effort to obtain other employment.

The Court of Claims held that Petitioner's right to receive pay terminated on June 25, 1976, when the Respondent's Motion for Rehearing was denied in a "speaking" Order.[6] The Court construed the June 25, 1976 Order of the Court of Claims to have held that the Petitioner had waived all further claim to backpay from that date by the position he had taken and his conduct with respect to the Respondent's Motion for Rehearing.[7] The Court further held that Respondent is entitled to an offset for the amount that the Petitioner could

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[6]Power v. United States, No. 439-74, April 18, 1979 Order. Appendix A at A-1.

[7]Ibid. Appendix A at p. A-7.

have earned by seeking and obtaining employment at minimum wage for the period from the date that the administrative appeal of the improper discharge was final, April 6, 1974, until the date of the Court's denial of rehearing, June 25, 1976.[8]

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND DECIDES FEDERAL QUESTIONS OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT.

The Court of Claims decision on the liability phase of this case dated March 17, 1976, held that Respondent had abused its discretion in applying a penalty to the actions it had found Petitioner to have committed. Therefore, the removal of the

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[8]Ibid. Appendix A at p. A-22.

Petitioner from his position was unlawful, illegal and ineffective.

Under the applicable decisions of this Court it is clear and undisputed that an employee who has been wrongfully removed from his position is entitled to the pay of his position until he has been properly removed. United States v. Teston, 424 U.S. 392 (1976); United States v. Wickersham, 201 U.S. 290 (1906); Ainsworth v. United States, 399 F.2d 176 (Ct.Cl. 1968); and United States v. Perkins, 116 U.S. 483 (1886).

The United States Court of Claims, by its decision of April 18, 1979, held that even though Petitioner was never properly removed from his position, his right to pay terminated on June 25, 1976. The Court indicated that it had based its decision on a purported waiver. The Court stated:

> "We construe the statement in the June 25, 1976 Order as a holding by the Court that plaintiff, by his position and conduct with respect to the defendant's rehearing motion, had waived all claim to further backpay (as well as to reinstatement). The Court did not, at that time, consider that plaintiff could recover further backpay even though he affirmatively rejected reinstatement. If plaintiff believed that he could, he should have sought clarification or change in the Order of June 25, 1976."[9]

The Supreme Court of the United States in the case of Fay v. Noia, 372 U.S. 391 (1963) stated that "the classic definition of waiver enunciated in Johnson vs. Zerbst, 304 U.S. 458, 464, 82 L.Ed. 1461, 1466, 58 S.Ct. 1019, 146 ALR 357 - 'an intentional relinquishment or abandonment of a known right or privilege' - furnishes the controlling standard". The Supreme Court has also held that "an effective waiver must be one of a known right or privilege", Curtis Publishing Company vs. Butts, 388 U.S. 130 (1967). "No man can be bound by a waiver of his rights unless such waiver is distinctly made, with full knowledge of the rights

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[9]Ibid. Appendix A at p. A-7.

which he intends to waive; and the fact that he knows his rights and intends to waive them must plainly appear." 28 Am.Jur.2d 840-841; Section 158 Estoppel and Waiver.

A review of the proceedings in this case in light of the above definition of waiver clearly indicates that Petitioner has not waived his right to receive pay until he has been properly removed. Petitioner filed this suit seeking reinstatement and backpay based upon his contention that his removal was an abuse of discretion. The Respondent moved for a Summary Judgment of dismissal and Petitioner moved for a Summary Judgment as to liability. As set forth above, the Court denied Respondent's motion and granted Petitioner's motion. However, the Court elected not to exercise its 28 U.S.C. 1491 authority to order Petitioner's reinstatement. The Respondent, impliedly recognizing that under well established law it had continuing

liability to Petitioner for his pay until he was validly discharged, filed a Motion for Rehearing. In Petitioner's response to Defendant's Motion for Rehearing, Petitioner took the position that under 28 U.S.C. 1491 the Court had the discretion to affirmatively order reinstatement but that said action was not necessarily mandatory. Petitioner never took the position that the Court's refusal to order reinstatement effectively removed him or terminated his right to receive the pay of his position until he was validly removed.

Furthermore, there is no basis for an implied waiver as the Order of the Court cites no authority to support its conclusion and the Court of Claims has previously held that it will not, without a proper showing, imply a waiver. New York Shipbuilding Corp. v. United States, 385 F.2d 427 (Ct. Cl., 1967)

The Court, in its Order of June 25, 1976 overruling Defendant's Motion for Rehearing, stated:

> "In denying rehearing en banc the Court emphasizes that it deems that plaintiff, in his opposition to the defendant's petition en banc and for rehearing, has rejected the position that he had to be reinstated, and the Court concludes that he is content with the relief he has been accorded."[10]

The relief which Petitioner had been accorded was a Summary Judgment that the Respondent's action in removing him constituted an abuse of discretion. Under well established law, that made the Respondent liable to the Petitioner for the pay of his position until he was validly removed. Therefore, while Petitioner may have waived his right to an affirmative Order of the Court requiring Respondent to reinstate him, he certainly did not waive his right to the pay of his position until he was validly removed.

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[10] Power v. United States, 210 Ct.Cl. 742 (1976). Appendix D at D-1.

It is also quite significant that in the Court's Order of June 25, 1976, the Court spoke to the Petitioner's right to recover backpay indefinitely. The Court said:

> "If defendant remains fearful that, despite plaintiff's position on the rehearing petition, he will be able to recover backpay indefinitely, it can always reinstate him voluntarily."[11]

The Court's Order of June 25 did not say that Petitioner's position on the rehearing terminated his right to pay nor did the Court say that its Order of March 17, 1976 terminated the Petitioner's right to receive pay.

Under the above circumstances it certainly cannot be said that Petitioner waived his rights. Likewise, it cannot be said that such waiver was distinctly made with full knowledge of the rights which he intended to waive. Finally, it certainly

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[11] Ibid. Appendix D at D-1.

does not "plainly appear" that Petitioner intended to waive his right to his pay.

The Court stated in its opinion of April 18, 1979 that

> "We construe the statement in the June 25, 1976 Order as a holding by the Court that plaintiff, by his position and conduct with respect to the defendant's Rehearing Motion, had waived all claim to further backpay (as well as to reinstatement)."[12]

It is apparent that the Court has failed to distinguish between its discretionary authority under 28 U.S.C. 1491 to affirmatively order the reinstatement and its authority to determine that an employee's removal was unlawful, thereby subjecting the Respondent to liability for his pay.

The basis upon which the Respondent is liable for the employee's pay is that the employee, once

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[12] Power v. United States, No. 439-74, April 18, 1979 Order. Appendix A at A-7.

appointed to a position, is entitled to the pay of that position until he is validly removed. He receives his pay as a result of statutory entitlement. He does not receive pay for having done work for the government. On the other hand, an affirmative Order of the Court requiring a particular person's reinstatement to a particular job presents other considerations. In the latter case, the Court is exercising traditional equitable jurisdiction and, under the facts in a particular case, such an order may not be appropriate. Therefore, a finding by the Court that a person's removal was an abuse of discretion subjecting the Respondent to liability for the pay of the position until proper removal does not necessarily mean or even probably mean that it would be appropriate, in the exercise of equitable discretion to affirmatively order reinstatement. Likewise, a decision by the Court not to affirmatively order reinstatement does not

amount to a termination or a holding that the government has no further liability for backpay. Otherwise, the Court would put itself in the position of exercising executive discretion. Under such circumstances, backpay cases would take on the nature of damage suits.

The question of whether or not the Court of Claims can effectively remove a government employee after finding that the agency's removal of him was an abuse of discretion is a question of first impression before this Court. Prior to 1972, the power of reinstatement resided alone in district courts, and a plaintiff who won backpay in the Court of Claims had to go to the district court in a pro forma action to get reinstated. The 1976 amendment to 28 U.S.C. 1491 provided the Court of Claims with the power to make such a plaintiff whole by allowing reinstatement and award of backpay in one action. The amendment did not provide

the Court of Claims with executive discretion to determine whether or not to remove a validly appointed employee from his position. The Court of Claims' decision in effectively removing Petitioner from his position after determining that the agency's action in removing him was an abuse of discretion is inconsistent with and contrary to the intent of the remand statute. This decision by the Court usurps executive authority to determine who should be removed from a position and for what reasons. Accordingly, since the Court determined that the agency's removal of Petitioner was invalid and since the Court of Claims has no jurisdiction to remove Petitioner, he remains in the position to which he was appointed. As indicated above, Petitioner has taken no action which could be deemed to constitute a waiver of his right to receive the pay of his office. He remains entitled to that pay until such time as he is validly removed or retired.

In addition to holding that Petitioner's right to pay terminated on June 25, 1976, the Court's decision of April 18, 1979 further determined that Respondent was entitled to an offset. The amount of the offset was the amount that Petitioner might have earned by seeking and obtaining employment at the applicable minimum wage for the period beginning on April 6, 1974, the day after his removal from government service became final, until June 25, 1976, the date of the Court of Claim's denial of Respondent's Motion for Rehearing. This decision was entered in spite of a specific finding that Petitioner had no other earnings.

The Back Pay Act, 5 U.S.C. Section 5596 (1976), provides in part that a government employee who is found to have undergone an unjustified or unwarranted personnel action, which has resulted in the withdrawal or reduction of all or a part of his pay, is entitled, on correction of the personnel action:

> "***to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay *** that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period ***."
> 5 U.S.C. Section 5596(b)(1) (1976) (emphasis added).

As indicated above, the Court found that Petitioner did not have any earnings through other employment during the applicable period.

The Court of Claims construed the statutory provision to include in the offset the amount that Petitioner might have earned had he exerted a reasonable effort to secure other employment, citing the decision in Schwartz v. United States, 181 F. Supp. 408 (Ct.Cl. 1960), which concerned a statute similar to the Back Pay Act. There is no basis in this statute for such an implied intent. Further, the implied intent as construed by the Court of Claims places an undue and improper burden upon the

Petitioner to disprove his ability to obtain other employment as the Court required no specific showing by the Respondent that Petitioner would have been able to obtain such employment. Furthermore, the Respondent was not required to produce any evidence of the amount Petitioner would have earned from any such employment.

SUMMARY

It has been the law, as clearly announced by both this Court and the Court of Claims since 1886 that a validly appointed civil service employee is entitled to the pay of his office until he is validily removed. The Court of Claims in this case has determined that Petitioner's removal was invalid. Nevertheless, the Court determined that Petitioner's right to receive the pay of his position terminated on June 25, 1976. In essence, the Court of Claims removed Petitioner from his position

and, in doing so, exceeded its jurisdiction. The Court has attempted to justify its action by a determination that Petitioner waived his right to backpay. However, no action or inaction by Petitioner could be held to constitute a waiver as that concept has been defined by this Court.

The Court of Claims also awarded Respondent an offset when the evidence established as a matter of law that there was nothing to offset.

In the above regard, the Court of Claims has erred. The Court recognized that Petitioner has been subjected to an abuse of discretion by the Respondent in punishing him to the extent that it was unconscionable. This abuse of discretion has severly damaged Petitioner. The Court of Claims has recognized Petitioner's right but has left him without a meaningful remedy. Petitioner must now seek relief in this Court as his last resort.

PRAYER

Petitioner prays that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Claims.

Respectfully submitted,

By: _____
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APPENDIX A
IN THE UNITED STATES COURT OF CLAIMS

No. 439-74
(Decided April 18, 1979)

LUTHER G. POWER, JR. v. THE UNITED STATES

Philip E. McCleery, attorney of record, for plaintiff. Sheehy, Lovelace & Mayfield, of counsel.

Donnie Hoover, with whom was Assistant Attorney General Barbara Allen Babcock, for defendant.

Before DAVIS, KASHIWA and SMITH, Judges.

OPINION

PER CURIAM:* This is a Rule 131(c) proceeding to determine the amount of the plaintiff's recovery under the court's decision of March 17, 1976, Power v. United States, 209 Ct. Cl. 126, 531 F.2d 505,

*Except for the section on "Termination of Right to Pay," this opinion incorporates the opinion of Trial Judge Mastin G. White, with minor modifications. The necessary findings of fact are contained in this opinion and the earlier opinion, and in the appended supplementary findings.

which held that the defendant was liable to the plaintiff and remanded the case to the trial division for a determination of the amount of the plaintiff's recovery.

Employment

The plaintiff was formerly a civilian employee of the Department of the Army in the competitive civil service. After successfully completing a 2-year period of training at the AMC Ammunition School, Savanna Army Depot, Savanna, Illinois, the plaintiff was promoted from GS-7 to GS-9, step 1, effective February 2, 1970, and was assigned to a position as an ammunition inspector (surveillance) at the Fort Wingate Army Depot, Gallup, New Mexico. At Fort Wingate, the plaintiff was advanced to step 2 in grade GS-9 effective December 27, 1970; and then, because of superior service, he received an advancement to step 3 in grade GS-9 on January 10, 1971.

On April 9, 1971, the plaintiff was transferred from the Fort Wingate Army Depot in New Mexico to the Red River Army Depot, Texarkana, Texas. In connection with this transfer, the

plaintiff was entitled to certain travel allowances for the transportation and subsistence of himself and his dependents, and for the shipment of his household goods and personal effects. Claims for such allowances were subsequently submitted by the plaintiff.

While serving at the Red River Army Depot, the plaintiff was advanced to step 4 in grade GS-9 effective January 9, 1972.

Removal

On September 18, 1972, the plaintiff was involuntarily removed from his position at the Red River Army Depot. The removal was based upon charges which, as ultimately upheld by the Board of Appeals and Review of the Civil Service Commission at the end of a series of administrative appeals by the plaintiff, alleged that the plaintiff, in submitting a voucher for reimbursement of expenses incurred as a result of his transfer from the Fort Wingate Army Depot in New Mexico to the Red River Army Depot in Texas, had submitted a false document indicating the expenditure of $175 for temporary

lodging, when in fact this expenditure was in the amount of only $125, and that he had submitted false documentation indicating expenditures for meals supposedly eaten by his wife during the move, although in fact the plaintiff's wife did not accompany him on the move from New Mexico to Texas.

Judicial Proceedings

Having exhausted the administrative remedies available to him in connection with his involuntary separation from the government service, the plaintiff instituted the present action in this court on December 23, 1974. In the petition, the plaintiff asked for a judgment for back pay from September 18, 1972, and for reinstatement in the position from which he was involuntarily removed.

On May 27, 1975, the defendant filed a motion for summary judgment; and the plaintiff thereafter filed a cross-motion for summary judgment on June 30, 1975.

On March 17, 1976, the court rendered a decision denying the defendant's motion for summary judgment, granting the plaintiff's cross-motion,

entering judgment for the plaintiff on the issue of liability, and remanding the case to the trial division for a determination of the amount of the plaintiff's recovery under Rule 131(c). Power v. United States, 209 Ct. Cl. 126, 531 F.2d 505. The court held that the penalty of dismissal which the Department of the Army, with the subsequent approval of the Civil Service Commission, assessed against the plaintiff "was so unconscionably disproportionate as to be an abuse of discretion by defendant." Id. at 129, 531 F.2d at 507. The court said that the plaintiff was entitled to recover back pay, but that it had "determined not to order reinstatement in this action in the light of the unusual nature of this case" (emphasis in original). Id. at 135, 531 F.2d at 510.

On May 5, 1976, the defendant filed a motion for rehearing in the case. This motion was denied by the court in an order dated June 25, 1976. 210 Ct. Cl. 742.

Over a period of months, the parties attempted, through negotiations, to reach an agreement on the amount due the plaintiff under the court's decision of March 17, 1976. Such negotiations ultimately

proved to be unsuccessful; and, after the parties had engaged in discovery procedures, a trial on the issue of damages was held in Waco, Texas, on November 14, 1977. The customary post-trial procedures by the parties under the rules of the court were conducted thereafter.

Termination of Right to Pay

One of the questions to be decided in the present proceeding under Rule 131(c) relates to the termination date of the plaintiff's right to receive pay under the court's decision of March 17, 1976.

With respect to this question, the defendant contends that the plaintiff's right to receive pay terminated on the date of the court's decision, i.e., on March 17, 1976.

The plaintiff, on the other hand, contends that he is entitled to receive pay through November 14, 1977, i.e., the date of the trial on the issue of damages under Rule 131(c).

The trial judge opted for March 17, 1976, but the court rejects both of the dates urged by the

parties and holds that the termination of plaintiff's right to receive pay occurred in this case on June 25, 1976, when the Government's motion for rehearing was denied in a "speaking" order. That order declared in pertinent part:

> In denying rehearing en banc the court emphasizes that it deems that plaintiff, in his opposition to the defendant's petition for rehearing en banc and for rehearing, has rejected the position that he had to be reinstated, and the court concludes that he is content with the relief he has been accorded. In that situation reinstatement is certainly not mandatory, just as it would not be if plaintiff had failed to ask for reinstatement in his petition [See Rule 35(g)] or other papers. If defendant remains fearful that, despite plaintiff's position on the rehearing petition, he will be able to recover back-pay indefinitely, it can always reinstate him voluntarily. The court's decision [reported at 209 Ct. Cl. 126, 531 F.2d 505 (1976)] does not preclude such action by the Government. (Power v. United States, 210 Ct. Cl. 742, 743).

Plaintiff never challenged that statement nor sought rehearing or modification of it.

We construe the statement in the June 25, 1976 order as a holding by the court that plaintiff, by his position and conduct with respect to the

defendant's rehearing motion, had waived all claim to further back pay (as well as to the reinstatement). The court did not, at that time, consider that plaintiff could recover further back-pay even though he affirmatively rejected reinstatement. If plaintiff believed that he could,[1] he should have sought clarification or change in the order of June 25, 1976.

The parties have stipulated that, if the termination date is June 25, 1976 (as we hold), plaintiff is entitled to back-pay of $59,199.36 (including a retirement deduction of $3,710.06 and a lump-sum for annual leave of $6,169.28).[2]

Level of Pay

The plaintiff argues that the computation of back pay should take into account a promotion of the plaintiff from grade GS-9 to grade GS-11 as of

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[1]At the oral argument on the present phase of the case, plaintiff's counsel asserted the right to recover back-pay (in a new suit or suits) indefinitely or at least up to retirement age.

[2]The computation assumes that plaintiff would have remained in Grade GS-9 but would have advanced to step 5 of GS-9 on January 6, 1976, and to step 6 on January 4, 1976.

October 1, 1972, and subsequent step increases in grade GS-11 on October 14, 1973, October 14, 1974, and October 12, 1975. The argument on this issue is based upon the plaintiff's testimony in the record to the effect that at about the time of his transfer from the Fort Wingate Army Depot to the Red River Army Depot, he was informed by his superiors (not identified by name) that he was slated for a subsequent transfer overseas; that at the time in question, a number of ammunition inspectors were being transferred by the Department of the Army to the Far East, principally to Vietnam; and that he was told such a transfer resulted in a promotion from GS-9 to GS-11 in accordance with a then-current Department of the Army policy designed to encourage service in the Far East (although the policy was not incorporated in a statute or regulation).

In the absence of conflicting evidence, the plaintiff's testimony, together with the excellent record that he had made in the performance of his duties as an ammunition inspector, warrants the inference that if the plaintiff had continued in the service after September 18, 1972, he might well

have been transferred to the Far East within a reasonable period of time and, in connection with such transfer, might well have received a promotion from grade GS-9 to GS-11.

The possibility or mere probability of promotion, however, is not sufficient for this factor to receive consideration in connection with a determination as to the level of pay on which the plaintiff's recovery is to be computed.

There are numerous decisions by this court announcing the general rule that a civilian employee of the Government, or a member of the Armed Forces, is entitled only to the rights and salary of the position to which such person has been administratively appointed. E.g., Bielec v. United States, 197 Ct. Cl. 550, 560, 456 F.2d 690, 696 (1972); Peters v. United States, 208 Ct. Cl. 373, 377, 534 F.2d 232, 234 (1975). In order to recover on the basis of the salary of a higher position than that to which a claimant has actually been appointed, the claimant must normally show a legal entitlement to the pay of the higher position. Selman v. United States, 204 Ct. Cl. 675, 684, 498 F.2d 1354, 1358 (1974); Doggett v. United States, 207 Ct. Cl. 478,

482 (1975). Possibly the Federal Personnel Manual Supplement 990-2 may qualify this requirement somewhat when it provides for back-pay on the basis of a higher grade if it is "clearly established" that the promotion would have occurred but for the improper personnel action.[3]

The plaintiff in the present case does not contend that the Department of the Army would have been under a mandatory duty to promote him to grade GS-11 as of October 1, 1972 -- or at any other time -- if he had continued in the service after September 18, 1972. Nor is it "clearly established" that he would have been promoted. His claim to the salary of the higher grade is based only upon hope, and perhaps reasonable expectation. Consequently, under all the authorities, this claim must be rejected.

It follows, therefore, that the amount of the plaintiff's entitlement to back pay is $59,199.36,

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[3]The Manual provides for such back pay "if it is clearly established by appropriate authority that, under applicable law, Executive order, regulation, or collective bargaining agreement, the employee would have been selected for the promotion, but for the unjustified or unwarranted personnel action." FEDERAL PERSONNEL MANUAL SUPP. 990-2, Book 550, Subch. 8, §8-4(b)(2) (1977) (emphasis in original).

based upon the salary of the position to which he had been administratively appointed and which he was occupying at the time of his involuntary separation from the service, as affected by the step increases that he would have received between the date of his separation from the government service and the date of the court's decision.

Expenses

The plaintiff claims -- and the defendant concedes -- that the plaintiff is entitled to recover in the present action:

(1) reimbursement in the amount of $378.00 for travel expenses incurred by the plaintiff in connection with the prosecution of his appeals at the administrative level from the adverse action that was taken against him by the Department of the Army; and

(2) reimbursement in the amount of $1,635.08 as the allowable travel expenses incurred by the plaintiff in connection with his move from the Fort Wingate Army Depot to the Red River Army depot in 1971.

The plaintiff also asserts a claim -- which the defendant opposes -- for reimbursement in the amount of $257.08 to cover travel expenses which the plaintiff's attorney incurred, and which the plaintiff defrayed, on a trip from Waco, Texas, to Washington, D.C., and return, in connection with the successful conduct of the present litigation.

The plaintiff's argument in support of this claim is based upon the portion of the Federal Personnel Manual Supplement 990-2, Book 550, Subch. 8, §8-6(11), which provides for the payment of a government employee's travel expenses incurred in successfully prosecuting an administrative appeal from an adverse administrative action. Although the Federal Personnel Manual does not refer to travel expenses incurred by such an employee's attorney, the plaintiff states in his brief that "Clearly Plaintiff is entitled to be represented in the Court of Claims by counsel and counsel's expenses are made necessary for the successful prosecution of Plaintiff's appeal," and that the plaintiff "should be entitled to recover this amount".

This court, in rendering judgment for a claimant in a case involving the taking of property by a

government agency, is authorized by 42 U.S.C. §4654 (c) (1976) to include an amount for reasonable litigation expenses incurred by the claimant in prosecuting the case. The court, however, is not authorized to make an award for litigation expenses incurred by a claimant in successfully prosecuting a civilian pay case, such as the present one.

Accordingly, the plaintiff's claim in the amount of $257.08, relating to litigation expenses, must be rejected.

Offset

The defendant contends that it is entitled to an offset against the amount awarded to the plaintiff, because (according to the defendant) the plaintiff failed to mitigate damages by making a reasonable effort to obtain other employment after his involuntary separation from the government service.

In support of this argument, the defendant refers to the Back Pay Act, 5 U.S.C. §5596 (1976), which provides in part that a government employee who is found to have undergone an unjustified or

unwarranted personnel action, which has resulted in the withdrawal or reduction of all or a part of his pay, is entitled, on correction of the personnel action:

> *** to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay *** that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period ***. 5 U.S.C. §5596 (b)(1) (1976) (empnasis added)

The evidence in the record shows that the plaintiff did not have any earnings through other employment during the period between the date of his involuntary separation from the government service and the date of the court's decision or the date of the denial of rehearing. His entire income during that period consisted of his retirement pay from the Navy. (The plaintiff retired from the Navy as a Chief Petty Officer, E-7, in 1970, after serving on active naval duty from 1939 until 1960 and then remaining in the Fleet Reserve from 1960 to 1970.)

Although the portion of the Back Pay Act previously quoted refers only to the deduction of "any

amounts earned *** through other employment" during a period when the pay of a government employee has been improperly withdrawn or reduced, the defendant cites this court's decision in Schwartz v. United States, 149 Ct. Cl. 145, 181 F. Supp. 408 (1960), which construed a statutory provision similar to the current Back Pay Act. In that decision, the court said (among other things) that:

> ***the clearest implication that can possibly be drawn from the language used, is that it was contemplated that the claimant would make a reasonable effort to secure other employment and that the amount which the claimant earned, or with reasonable effort might have earned, be deducted from the total amount of compensation that would otherwise be paid under the statute. *** 149 Ct. Cl. at 147, 181 F.Supp. at 410 (emphasis supplied).

The defendant argues that the plaintiff in the present case, with reasonable effort, could have obtained employment paying at least the applicable minimum wage, and thus could have earned at least $9,908.80 during the period beginning 1 year after the date of his involuntary separation from the government service and extending through the date of the court's decision holding that his removal from his position was unlawful; and that this sum

should be offset against the amount which the plaintiff would otherwise be entitled to recover in the present action.

The defendant, in explaining its concession that it is not entitled to any offset because of the plaintiff's failure to seek other employment during the 1-year period immediately following his separation from the government service, quotes from a regulation of the Civil Service Commission, 5 C.F.R. § 550.804(f) (1977), which stated in part as follows:

> (f) In computing the amount of back pay due an employee under *** [the Back Pay Act], if the employee has been restored within 1 year after his erroneous separation, the agency may not delete any period from computation on the basis that the employee was under obligation to make an effort to secure other employment during the period covered by the unjustified or unwarranted personnel action.[4]

[4]This regulation was amended effective March 25, 1977. The amended regulation does not contain any one-year exclusion of setoffs for other employment; it merely states that "*** the agency shall deduct the amounts earned by the employee from other employment during the period covered by the corrected personnel action." 41 Fed.Reg. 16,127, 16,128 (1977), codified in 5 C.F.R. §550.804(e) (1978). Because defendant has not actively contested before this court the beginning date for computation of the offset, see note 5, infra, we have no occasion to consider the impact, if any, of the amended regulation.

It seems to be the defendant's view that the quoted regulation, by necessary implication, gives the defendant a right of offset after the expiration of the 1-year period immediately following the plaintiff's separation from the government service, because of the plaintiff's subsequent failure to make a reasonably diligent effort (in the defendant's opinion) to obtain other employment. This view that the plaintiff was under an obligation to begin to seek other employment immediately after the expiration of an arbitrarily fixed 1-year period following his separation from the government service should not be accepted, in our opinion. Rather, the plaintiff's specific situation should be taken into account.

In September 1973, at the end of the 1-year period following his removal from his position with the Department of the Army, the plaintiff was awaiting, and preparing for, a hearing before a representative of the Dallas Regional Office of the Civil Service Commission on the plaintiff's initial appeal to the Commission. Furthermore, he was entitled to appeal to the Board of Appeals and Review of the Commission if the decision of the

Dallas Regional Office should turn out to be adverse to him. Under the circumstances, it would be unfair to hold that the plaintiff was under an obligation at that time to begin a diligent effort to obtain other employment, when he was pursuing his administrative remedies in an effort to overturn the action of the Department of the Army.

Under the portion of this court's decision in the Schwartz case, supra, dealing with the question of when the obligation of the claimant in that case to seek other employment began, 149 Ct. Cl. at 148, 181 F.Supp. at 410, the proper view seems to be that a government employee who has been improperly removed from his position is not required to seek other employemnt while appellate administrative proceedings are in progress and the employee is endeavoring to obtain reinstatement; but that the obligation to seek other employment does arise when the adverse action removing him from his position becomes final at the administrative level. In the present case, the plaintiff's removal from his position actually did not become final until the Board of Appeals and Review of the Civil Service Commission rendered the final administrative

decision on April 5, 1974, upholding the plaintiff's removal and finally concluding the series of administrative appeals to which the plaintiff was entitled.

Consequently, the defendant is not properly entitled to any reduction in the award to the plaintiff because of his failure (if any) to make a diligent effort to obtain other employment during the period from the date of his involuntary separation from the government service and the date (April 5, 1974) when his efforts at the administrative level to obtain reinstatement came to an end with the final decision of the Board of Appeals and Review of the Civil Service Commission. Perhaps it should be stated at this point that, during the period just mentioned, the plaintiff devoted much of his time, efforts, and thoughts to the endeavor to obtain reinstatement in the position from which he had been improperly removed.[5]

A different situation obtains, however, with respect to the period beginning April 6, 1974, and extending through June 25, 1976, the date of the court's denial of rehearing. The plaintiff's

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[5]Before the judges, defendant did not contest the trial judge's conclusion that no offset was allowable for the period prior to April 6, 1974.

removal had become final at this time; and the evidence indicates clearly that the plaintiff did not make a reasonably diligent effort to obtain other employment.

The supplementary findings of fact relate in some detail the rather half-hearted efforts that the plaintiff made to obtain other employment after he was removed from his position by the Department of the Army on September 18, 1972. Insofar as such efforts can be definitely fixed as to the time, they occurred during the period while the plaintiff's appeals at the administrative level were still in progress and while the plaintiff was still hoping and expecting to obtain reinstatement in his position -- i.e., during the period when the plaintiff actually was not under an obligation to seek other employment. As for the period after April 5, 1974, when the plaintiff's removal from his position became final, there is no clear evidence in the record that the plaintiff made any effort whatever to obtain other employment. Presumably, his retirement pay from the Navy and the earnings of his wife, who was working, were deemed adequate to meet the family's financial needs.

During the period which began on April 6, 1974, and extended through June 25, 1976, the plaintiff's age was in the 52-54 range; he was physically and mentally capable of working; he was a competent person; he was an experienced aviation mechanic (having performed that type of work during his last 12 years of active naval duty); and he was experienced in the field of ammunition and explosives by virtue of his work for the Department of the Army. It is only reasonable to infer, and to find, that if the plaintiff had made a reasonably diligent effort to obtain employment, he could have found work at wages that would have been at least equal to the applicable minimum wage at the time, in view of the plaintiff's age, experience, and competency. It is our view, therefore, that the defendant is entitled to offset, against the award otherwise due the plaintiff, the sum of $9,284.00, representing the amount that the plaintiff could have earned by seeking and obtaining employment at the applicable minimum wage during the period that began on April 6, 1974 (the day after his removal from the government service became final) and

extended through June 25, 1976 (tne date of the court's denial of rehearing.)[6]

Conclusion

The plaintiff is entitled to a judgment in the net amount of $51,928.44, consisting of $59,199.36 (including $3,710.06 for retirement) for back pay, $378.00 as reimbursement for travel expenses incurred by the plaintiff in connection with the prosecution administratively of his adverse-action appeals, and $1,635.08 as reimbursement for allowable travel expenses incurred by the plaintiff during his move from the Fort Wingate Army Depot in New Mexico to the Red River Army Depot in Texas, less an offset of $9,284.00 to which the defendant is entitled.

SUPPLEMENTARY FINDINGS OF FACT

The court makes the following supplementary findings of fact:

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[6]The figure of $9,284.00 is derived from a stipulation of the parties (with a slight correction in plaintiff's favor for a legal holiday which would not have been worked).

1. (a) In September 1972, shortly after he was removed from his position at the Red River Army Depot, the plaintiff submitted an application for employment to the Texarkana, Texas, branch office of the Texas State Employment Commission. At the time, he was not offered a position by that office.

(b) When he moved from Texarkana to Waco, Texas, the plaintiff informed the Texarkana branch office of the Texas State Employment Commission regarding his change of address. However, he never heard anything from the Texarkana branch office, and he did not communicate with that branch office again.

2. There is a branch office of the Texas State Employment Commission located in Waco, Texas, where the plaintiff has been living since the fall of 1972. The plaintiff did not at any time, however, confer with the Waco branch office regarding the possibility of obtaining employment.

3. In McGregor, Texas, a town that is located fairly close to Waco, Texas, there is a plant of the Rocketdyne Company that makes rockets (among other things), mainly under government contracts. Sometime in 1973, the plaintiff went to the

Rocketdyne plant and spoke to the Personnel Director about the possibility of obtaining employment, but the company was not doing any hiring at that time. During the course of the interview, the plaintiff told the Personnal Director about his Army job, and stated that he expected to be reinstated at any time. The Personnel Director indicated that the matter of the plaintiff's reinstatement in his Army job ought to be resolved before the plaintiff submitted a formal application to Rocketdyne.

4. On one occasion, the plaintiff interviewed the owner of an apartment house (presumably located in Waco, Texas) about a job as apartment house manager. When the plaintiff, in order to be forthright, informed the man that he was awaiting reinstatement in his Army job, the man indicated that he was not interested in employing the plaintiff because of the uncertainty as to the length of the plaintiff's tenure, if employed.

5. The plaintiff (at a time not disclosed by the record) submitted applications to the District Offices of the Civil Service Commission in Houston, Texas, and in Dallas, Texas, for a mid-level position. However, he was never offered a position.

CONCLUSION OF LAW

On the court's decision of March 17, 1976 (209 Ct. Cl. 126, 531 F.2d 505), the order of June 25, 1976, denying rehearing (210 Ct. Cl. 742), the supplementary findings, and the foregoing opinion, the court concludes as a matter of law that the plaintiff is entitled to recover the net sum of fifty-one thousand nine hundred and twenty-eight dollars and forty-four cents ($51,928.44), which includes a retirement deduction of $3,710.06 to be credited to plaintiff, and judgment is entered for the plaintiff in that amount.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 439-74

LUTHER G. POWER, JR.

v.

THE UNITED STATES

Before DAVIS, Judge, Presiding, KASHIWA and SMITH, Judges.

ORDER

This case comes before the court on plaintiff's motion, filed May 7, 1979, for rehearing en banc pursuant to Rules 7(d) and 151(b), with reference to the slip opinion entered herein on April 18, 1979, granting judgment for plaintiff. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing en banc under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b).

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied.

BY THE COURT

/s/ Oscar H. Davis
Judge, Presiding

June 29, 1979

APPENDIX C
IN THE UNITED STATES COURT OF CLAIMS

No. 439-74
(Decided March 17, 1976)

LUTHER G. POWER, JR. v. THE UNITED STATES

Philip E. McCleery, attorney of record, for plaintiff. Sheehy, Lovelace & Mayfield, of counsel.

Donnie Hoover, with whom was Assistant Attorney General Rex E. Lee, for defendant.

Before COWEN, Chief Judge, DURFEE, Senior Judge, and KUNZIG, Judge.

ON DEFENDANT'S MOTION AND PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

KUNZIG, Judge, delivered the opinion of the court:

In this civilian pay case plaintiff, formerly employed as an Army Ammunition inspector, contests his dismissal seeking reinstatement and back pay.

The Army removed Power because he allegedly submitted false information in connection with a claim for travel expense reimbursement. We find the dismissal penalty so out of proportion to plaintiff's proven conduct that it constitutes an abuse of discretion by defendant. Accordingly, plaintiff is entitled to recover back pay.

The instant case stems from plaintiff's April 1971 transfer from Fort Wingate Army Depot in New Mexico to Red River Army Depot (Red River) at Texarkana, Texas. On June 4, 1971, following his transfer, plaintiff submitted a claim for travel expenses at the Red River Finance and Accounting Office. This claim included requests for reimbursement of household goods cartage payments, temporary rent costs and meal expenses. It is undisputed that plaintiff did not personally fill out the claim voucher. Instead, pursuant to Red River practice, he provided supporting documents to Mrs. Mary A. Goodman, a clerk at the Red River Finance and Accounting Office. Mrs. Goodman "filled out" the voucher.

After its preparation, Mrs. Goodman gave the voucher and supporting documents to her supervisor

who noted that certain "weight tickets" for the household good cartage had apparently been altered. Believing that plaintiff had altered the documents in an attempt to defraud the Government, the supervisor triggered an investigation by the CID and the FBI into plaintiff's claim.

One year later, on July 17, 1972, the Army issued a notice of proposed removal. Defendant accused plaintiff of submitting false information in connection with the claims. The charges related to claims for (1) cartage, (2) rent, and (3) meals. Specifically, the Army contended that plaintiff had moved only 1280 pounds of household goods, but altered the weight tickets in an attempt to obtain reimbursement for 5200 pounds. Further, defendant accused Power of claiming $175 for temporary lodging in May 1971 when in fact he had paid only $125. Finally, the Army claimed that Power had attempted to collect for meals taken by his wife during the move although he was not entitled to such reimbursement.[1]

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[1]Thus the rent error could be as much as $50. The record fails to show the amount plaintiff specifically spent for meals for his wife. Nor did defendant correct this deficiency. A fair estimate might be about $200.00. See note 4, infra.

On September 18, 1972, the Army removed plaintiff on the basis of these charges.

During the course of subsequent administrative proceedings, various facts emerged. The Civil Service Commission (CSC) hearing examiner determined that defendant failed to prove any alteration of the weight tickets and found for plaintiff on the substantial cartage charge. However, he held that the rent claim contained an error of $50 and, further, that Power's request for reimbursement for his wife's meals was improper.[2] Concluding that plaintiff had submitted false information in connection with the claims for rent and meals, the examiner upheld the Army's decision to remove plaintiff. The CSC Dallas Region appeals examiner and the CSC Board of Appeals and Review affirmed the hearing examiner.

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[2]Plaintiff had claimed reimbursement for meals taken by his wife at times when she was not specifically with him. Since under the examiner's interpretation of the regulations an employee may only obtain reimbursement for a dependent's meals when the dependent accompanies the spouse, the examiner concluded that Power had improperly attempted to obtain payment for certain of his wife's meals.

Plaintiff subsequently brought the present action to contest the administrative determinations. He attacks his removal primarily on two levels. First, contends plaintiff, defendant failed to establish guilt based on the offenses charged. Second, even if the charges were substantiated, the penalty of dismissal was unduly harsh.

Given the unique facts of this case, we hold the penalty was so unconscionably disproportionate as to be an abuse of discretion by defendant. We therefore find for plaintiff.

Power's first attack, that defendant has not established guilt, must fail.

It is well settled that our review of administrative determinations is limited to a finding of substantial evidence supporting the decision. Peters v. United States, 187 Ct. Cl. 63, 408 F.2d 719 (1969); Powers v. United States, 169 Ct. Cl. 626 (1965); Harrington v. United States, 174 Ct. Cl. 1110 (1966); Greenway v. United States, 163 Ct. Cl. 72 (1963). In the instant case, there is sufficient evidence to uphold the administrative determination of guilt despite some doubts raised

by various facts in the record. Thus plaintiff's removal cannot be upset based on defendant's alleged failure to prove guilt.

Plaintiff's second argument, that his penalty was too severe, stands on different footing.

The departure point for our inquiry into the propriety of plaintiff's penalty is an analysis of the standard for review. The administrative conclusions in this case were founded on the premise that removal was appropriate in view of the offenses alleged. Plaintiff contends otherwise.

As a general rule, a penalty for employee misconduct is a matter left to the discretion of the executive agency. Birnholz v. United States, 199 Ct. Cl. 532 (1972); Cook v. United States, 164 Ct. Cl. 438 (1964); Dulcy v. United States, 149 Ct. Cl. 153, 284 F. 2d 687 (1960). However, in two situations courts will not uphold the punishment imposed by the agency. The first test for an invalid penalty is whether or not the sanction exceeds the range of permissible punishment specified by statute or regulation. Daub v. United States, 154 Ct. Cl. 434, 292 F.2d 895 (1961);

Cuiffo v. United States, 131 Ct. Cl. 60, 68, 137 F. Supp. 944, 950 (1955). Under the second test, courts disapprove discipline which is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion by the agency.

> It is only where the transgression is so minor, and a discharge based thereon so 'unduly harsh and unwarranted, that the dismissal could be considered as constituting an abuse of discretion *** that demands redress by this court ***.' [Heffron v. United States, 186 Ct. Cl. 474, 484, 405 F.2d 1307, 1312 (1969)]. (emphasis added).

Recently this philosophy was reaffirmed by Judge Skelton, speaking for the court in a situation similar to the case at bar.

> In any event, we agree with plaintiff that his discharge on Count I after 22 years of satisfactory government service was too harsh and out of all proportion to the offense charged. We have held that a dismissal under such circumstances is an abuse of discretion, is illegal, and demands redress by this court ***. [Jacobowitz v. United States, 191 Ct. Cl. 444, 458-59, 424 F. 2d 555, 563 (1970)].

The same test has been used in Heffron v. United States, 186 Ct. Cl. 474, 485, 405 F.2d 1307, 1312-13 (1969); Liotta v. United States, 174 Ct. Cl. 91 (1966), and De Nigris v. United States, 169 Ct. Cl. 619, 625 (1965).

The usual test for abuse of discretion in evaluating a penalty necessitates "a showing by plaintiff that the penalty is so harsh that there is an 'inherent disproportion between the offense and punishment.'" Grover v. United States, 200 Ct. Cl. 337, 353 (1973). Further, if an abuse of discretion is demonstrated, the court will set aside the penalty even where it lies within the range of penalties permitted by statute or regulation. Id.

Having determined the standard of review, we turn to the facts presented in the instant case. Clearly, if plaintiff submitted false information in support of his claim for reimbursement, his dismissal was permitted by regulation.[3] If plaintiff is successfully to attack the validity of his dismissal, he must focus on the second standard discussed above; that it was an abuse of discretion for defendant to impose the maximum penalty permitted when he only committed a de minimis offense.

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[3]IR 690-3(730), App. VII, Figure 1: Table of Standard Penalties. For "false statements, misrepresentation or fraud of a substantial nature *** in the matter of *** entitlements in official records" the minimum penalty is a ten-day suspension; the maximum penalty, removal.

We agree with plaintiff that such is the case in the instant fact situation.

At each of the administrative appeal levels, it was conclusively established that defendant failed to prove the accusations relating to alteration of weight tickets. The case for plaintiff's removal thus rested on the two remaining minor charges: the rent discrepancy and the meals complaint.

It can be argued that the voucher was in error because plaintiff paid only $125 for rent in May 1971 rather than the $175 listed on the rental receipt. However, plaintiff's submissions through Mrs. Goodman, the Red River clerk, were valid in a manner of speaking. He had paid out $175 for rent, but apparently $50 of the payment was for a returnable deposit. Yet plaintiff was required to submit covering receipts, and the $175 receipt was the only proof he had. Whether or not plaintiff was only entitled to a $125 reimbursement, the fact remains there is no evidence in the record pertaining to his motives for submitting the $175 receipt. We cannot tell from the record if plaintiff acted

accidentally, willfully or in any way fraudulently. Thus, the entire $50 incident remains somewhat in doubt.

It can also be argued that plaintiff claimed reimbursement for some meals taken by his wife during May 1971 for which he was technically not entitled to reimbursement. The hearing examiner interpreted the applicable regulations to the effect that an employee may only claim meal expense incurred by a dependent if the dependent travels with the employee. See note 2. supra. In the instant case, plaintiff's wife remained in Waco, Texas, during the month in question and only joined her husband on weekends. It thus appears that Power's claim for meals for his wife's entire month's meal expenses included amounts to which he was not entitled. Again, there is a paucity of evidence in the record as to whether Power submitted the erroneous meal claims willingly and knowingly. It is not clear whether plaintiff understood the interpretation at the time he submitted his claim. The record does not indicate that the Red River clerk or anyone else ever

explained it to plaintiff. Again, there is doubt whether plaintiff knew he may have "padded" his reimbursement claim.

Moreover, the de minimis nature of the rent and meal discrepancies casts even more doubt on any possible "willfulness" on plaintiff's part. Defendant caught the discrepancies in its investigation process. Plaintiff was never paid the extra amounts. In any event, plaintiff could never have received the $50 "extra." He was entitled to a maximum reimbursement of $677.08 for rent and meals during his move. Plaintiff's reimburseable rent and meal expenses other than the $50 amounted to significantly more than this maximum. Therefore, at no time did the $50 error ever portend a loss to the Government. Against this background, it becomes even more difficult to believe Power submitted the erroneous rent claim willfully.

Plaintiff's claim for his wife's meal expenses becomes similarly de minimis. Once again, we cannot determine from the facts in the record precisely how much plaintiff improperly claimed for his wife's meals. We can, for purposes of evaluating

the seriousness of plaintiff's alleged misconduct, derive an estimate of his wife's meals claim.[4] Again, it would appear that any excessive meal claims made by plaintiff were minor.[5]

In short, the cumulative doubts expressed above suggest that the maximum penalty imposed on plaintiff is clearly too harsh and out of all proportion.

The doubt becomes even more significant given other key facts in this case. Defendant delayed over a year in bringing the charges against plaintiff. During this time, it "fine tooth combed" plaintiff's submissions. While we cannot say that

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[4]Plaintiff claimed $620.04 for meals for himself and his wife. If we assume that the meal costs were fairly equal for both, the wife's May 1971 meals cost $310.02. If she spent weekends and holidays with plaintiff, she would have spent roughly one-third of May with him. Power could have claimed $103.34 for her meals. His actual claim would then be excessive by some $206.68.

[5]Plaintiff's actual claim ($867.29) was $190.21 over his maximum allowable reimbursement under the law ($677.08). If the excessive claim for the wife was $206.68, the meal error could only have cost defendant $16.47 in actual dollars lost. The rent and meat errors combined, thus would have totaled $66.47.

the delay in and of itself "taints" the present proceedings against plaintiff, it certainly is a factor which should have been considered at the time defendant imposed the penalty.

Even more serious is the defendant's manner of proceeding in the present case. Defendant joined two relatively minor charges (rent and meals) with a serious and significant accusation (the cartage alteration). After failing to sustain the serious charge, the Government continued to advocate dismissal on the basis of the two relatively insignificant charges. Perhaps defendant really wanted to remove plaintiff for the serious offense, but when it found that the facts would not so allow, it achieved the same result by use of the two de minimis allegations. In other words, plaintiff's punishment for the two minor offenses might well have been based upon defendant's unsupported, continuing belief that he was guilty of the serious offense. Although defendant's motive for its manner of proceeding is not readily provable, certainly the specific facts of the case at bar raise substantial questions.

In Jacobowitz, supra, we were confronted with a similar problem. There, an IRS agent was removed on three charges: (1) negligent failure to process taxpayers' checks; (2) falsification of time sheets; and (3) failure to make efficient use of his time. The IRS itself dropped charge number (3), but continued to press for dismissal on the other two. We found insufficient evidence in the record to support the serious charge (falsification of records) and concluded that discharge on the de minimis remaining charge (negligent failure to process checks) was "to (sic) harsh and all out of proportion with the offense charged." Id., 191 Ct. Cl. at 458-59, 424 F.2d at 563. The instant situation is equivalent or even worse, since the strong charge was already rejected below.

Finally, defendant brings forth one last argument. It attempts to justify plaintiff's removal as necessary to deter other expense account "padders." At oral argument, defense counsel stated that the Government seeks to "make an example" of Power. We have no quarrel with defendant's goal. Deterrence can be an effective method of preventing

fraud upon the Government. However, at some point an unduly harsh penalty can effectively ruin defendant's goal of deterrence. Such a point has been reached here. Moreover, if the penalty is so harsh as to constitute an abuse, rather than an exercise of discretion, it cannot be allowed to stand. Clark, supra; Jacobowitz, supra. Even for a reason otherwise "virtuous." Plaintiff's conduct in no way justified removal. "The punishment does not fit the crime."

In summary, we are confronted with a case in which the penalty is so unconscionably disproportionate that it becomes an abuse of discretion. A plaintiff with an unblemished record of twenty-five years of Government service has been removed for submitting allegedly false information in connection with claims for travel expense reimbursement. Defendant failed to susbtantiate a serious charge of alteration of weight tickets, but continued to advocate dismissal based on two minor discrepancies. There is some doubt whether plaintiff actually filed false information, and there is even greater doubt that plaintiff submitted the de

minimis claims knowingly, intentionally and with the purpose to defraud the Government. The year's delay in bringing about plaintiff's removal poses yet another question concerning the fairness of the overly harsh penalty. Finally, defendant wishes to deter others from "padding" their expense accounts, but we doubt that "throwing the book" at plaintiff would have the desired effect.

We reemphasize that this suit is unique because of its particular facts. The general rule remains that the penalty imposed by the agency will be viewed as a matter within agency discretion unless such discretion is abused. Such discretion has been abused in the case at bar.

Accordingly, defendant's motion for summary judgment is denied and plaintiff's cross-motion is granted. Having carefully considered plaintiff's prayer for judgment, defendant's answer thereto, briefs, oral argument and the reinstatement power vested in us under Pub. L. 92-415, we have determined not to order reinstatement in this action in the light of the unusual nature of this case. Judgment is therefore entered for plaintiff, and the cause is remanded to the Trial Division for further proceedings under Rule 131(c) to determine the amount to be awarded plaintiff, consistent with this opinion.

APPENDIX D

IN THE UNITED STATES COURT OF CLAIMS

No. 439-74

LUTHER G. POWER, JR.

v.

THE UNITED STATES

Before COWEN, Chief Judge, DURFEE, Senior Judge, and KUNZIG, Judge.

ORDER

This case comes before the court on defendant's suggestion and motion, filed May 5, 1976, for rehearing en banc pursuant to Rules 7(d) and 151. Upon consideration thereof, together with the response in oppositon thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing en banc under Rule 7(d), such suggestion is denied. In denying rehearing en banc the court emphasizes that it deems that plaintiff, in his opposition to the defendant's petition for rehearing en banc and for rehearing, has rejected the position that he had to be reinstated, and the court concludes that he is

content with the relief he has been accorded. In that situation reinstatement is certainly not mandatory, just as it would not be if plaintiff had failed to ask for reinstatement in his petition [See Rule 34(g)] or other papers. If defendant remains fearful that, despite plaintiff's position on the rehearing petition, he will be able to recover back-pay indefinitely, it can always reinstate him voluntarily. The court's decision does not preclude such action by the Government.

The case having been further so considered by the panel listed above as to the motion for rehearing under Rule 151.

IT IS ORDERED that defendant's said motion for rehearing be and the same is denied.

BY THE COURT

/s/ Chief Judge

June 25, 1976

BENNETT, Judge, dissenting, with whom SKELTON, Judge, joins:

I respectfully dissent from the action of the majority in refusing an en banc rehearing, limited, however, to the narrow ground of its refusal to reinstate plaintiff to his position as he requested in paragraphs I and VIII of his petition. The court has held that plaintiff is entitled to back

pay because his discharge was illegal since in the court's opinion it was an excessive penalty for his offenses. In declining to reinstate plaintiff, the opinion of the court explains it only by saying "we have determined not to order reinstatement in this action in the light of the unusual nature of this case." [Emphasis in text.] The action of the court not to reinstate is implicitly based upon the language of the remand and reinstatement statute, Pub. L. 92-415, August 29, 1972, 86 Stat. 652, 28 U.S.C. §1491 (Supp. III, 1970), which states, in pertinent part:

> *** To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, ***. [Emphasis supplied.]

A literal reading of the statutory language suggests that it is permissive, not mandatory. But, " *** federal courts have allowed the expressed intention of Congress *** to prevail over the alleged plain-meaning of a statute." International Telephone and Telegraph Corp. v. United States, Ct. Cl. No. 263-73, decided June 16, 1976, slip op. 1-2. This statute cannot be read literally as the majority reads it because the legislative history of the provision and the Supreme Court clearly tell us that the statute "does not extend the classes of

cases over which the Court of Claims has jurisdiction." H.R. REP. NO. 92-1023, 92d Cong., 2d Sess. 3 (1972); S. REP. NO. 92-1066, 92d Cong., 2d Sess. (1972); 118 CONG. REC. H3769 (May 1, 1972); United States v. Testan, _____ U.S. _____ (Sup. Ct. No. 74-753), decided March 2, 1976). The Court of Claims has never had authority to determine who shall be appointed to government jobs under Civil Service, who shall be promoted, or who shall be fired. This is so well established as scarcely to need citation of authority. "The power of removal from office in the executive branch of the Federal Government, absent some specific provision to the contrary, is incident to the power of appointment. Keim v. United States, 177 U.S. 290, 293 (1900)." Morelli v. United States. 177 Ct. Cl. 848, 858 (1966); Sampson v. Murray, 415 U.S. 61, 70 n. 17 (1974). Thus, notwithstanding the fact that the court cannot discharge plaintiff, since the remand statute brought about no change in the law that makes discharges discretionary solely with the executive, limited only by the proper exercise of that discretion in accordance with the procedures established therefor, the court has in fact discharged plaintiff by refusing to reinstate him.

When a plaintiff is awarded back pay it is because he has been found not to have been legally separated from the payroll. Crocker v. United States, 130 Ct. Cl. 567 (1955). So, by what logic

and upon what grounds can it be held that plaintiff will not be reinstated when the court holds that he nas never been legally discharged in the first place? To so hold is to say that the court can exercise the discretion of the executive and discharge plaintiff. Here the court does not even say why it removes him. It does not have such removal authority. On the contrary, as shown above, it has never claimed heretofore to have such authority, which is denied to it. Under the Back Pay Act, 5 U.S.C. §5596 (1970), the court can review an adverse action, such as here, and award back pay for an illegal removal from position. But, nowhere is the court given any authority to fashion its own remedy in addition thereto, except reinstatement to make plaintiff whole because of the wrong done to him. We thus have here a case of first impression on the proposition of whether or not the court can construct relief short of reinstatement under Pub. L. 92-415. The testimony in support of the remand and reinstatement act, and the committee reports thereon, make it plain that not only was the jurisdiction of the court not being increased or changed thereby but that the purpose of the legislation was to enable the court when it awards back pay to make a plaintiff whole by reinstating him to his job. Prior to 1972 the power of reinstatement resided alone in the district courts and a plaintiff who won back pay in the Court of Claims then had to go

to the district court in a pro forma action to get reinstated. This was unwise so the Congress said that in such circumstances the Court of Claims may make him whole by reinstatement, all in one action. It did not say that his partial relief in this court should be continued as before the remand and reinstatement statute. To do so would have rendered that statute meaningless. Nor did Congress say that the court should have new authority to decide whether he should be separated when he is granted back pay because he should not have been separated. It would be strange indeed if the court's view is correct that we have authority to say plaintiff should be separated from the payroll at the same time we give him back pay because we find he should not have been separated. This is inconsistent and contrary to the intent of the remand statute, and frustrates it. Also, it usurps executive authority in determining who should be fired, and for subjective reasons different from those which say he should not have been fired and is entitled to back pay. It is just as wrong to do this as for the court to say who should be appointed or promoted when no regulation or statute has been violated. Discretion to hire, fire, and promote is not a judicial function.

The opinion of the court presents still another difficulty. Although the petition demands reinstatement, plaintiff's response to defendant's

motion for rehearing does not emphasize it, yet does not repudiate the petition. The court seizes upon this as amounting to waiver. It is defendant here who reminds the court that it has always been held that once there is an award of back pay there exists a continuing liability to award back pay until the individual is reinstated and properly discharged. The court in Ainsworth v. United States, 185 Ct. Cl. 110, 399 F.2d 176 (1968), quoted with approval the language of a dissent describing the result in McGuire v. United States, 145 Ct. Cl. 17, 24-25 (1959), that the plaintiff "gets judgment now for the pay he would have earned to date, and the next year he can bring another suit for his pay for that year, and so on until he is formally reinstated and discharged according to law." Recently the Supreme Court, in discussing cases of wrongful discharge or suspension said: "*** at least since the Civil Service Act of 1883, the employee is entitled to the emoluments of his position until he has been legally disqualified." United States v. Testan, supra, slip op. 10. See also, United States v. Wickersham, 201 U.S. 390 (1906), affirming the rule announced in Lellman v. United States, 37 Ct. Cl. 128 (1902); United States v. Perkins, 116 U.S. 483 (1886); Simon v. United States, 113 Ct. Cl. 182, 198 (1949); Borak v. United States, 110 Ct. Cl. 236, 78 F. Supp. 123, cert. denied, 335 U.S. 821 (1948). Under the precedents, all that

could bar plaintiff from getting other judgments for his back pay, based on what the court has held to be an illegal discharge, would be to hold he waived it in his response to defendant's motion (as the order of the court does here), or if he waited too long to claim such pay and was barred by laches. Plaintiff will otherwise be able to recover his salary from now on by bringing successive suits to recover on his continuing claim without performing any service. This is not in the public interest. It would be better to reinstate him in his position and if he is an incompetent or dishonest employee the agency can find a way to discharge him according to law. If the court does not follow this course, it is repudiating its precedents on the theory of back pay, and it is misconstruing the intent and purpose of the remand and reinstatement statute which was designed to make a wronged government employee "whole" in his remedy. It is restricting his rights and giving him half a loaf. I agree that a plaintiff should not be reinstated unless he asks for it, as his petition does here. I do not agree that a waiver of such demand is implied here. The order of the court cites no authority to support its conclusion. On the contrary, the court has previously held that it will not, without a proper showing, imply a waiver. New York Shipbuilding Corp. v. United States, 180 Ct. Cl. 446, 385 F.2d 427 (1967). The court also holds

that just because it does not reinstate him is no bar to the agency doing so if it fears another suit for back pay. If the court is not going to insist upon making plaintiff whole, his agency is unlikely to feel under any compulsion to do so. True, the court does not order that plaintiff not be reinstated, but why should the agency reinstate him when the court indicates that it holds the belief plaintiff has waived his claim to reinstatement? What the court has failed to do here is to face up to what the reinstatement and remand statute means when it awards back pay in a case where plaintiff has also asked for reinstatement. It is not entitled to anticipate a waiver in such a case in a potential proceeding subsequent to its judgment. Having sought unsuccessfully to extend the remand and reinstatement statute into areas where it had no jurisdiction in Testan, supra, the court is overreacting in not employing the statute where it clearly has authority and, I think, a compelling duty to do so. "A court must be particularly cognizant of the implications of a given case in the situation where it is confronted with clear evidence of legislative intent and must formulate an application of the statute which furthers such Congressional purpose." First Nat'l City Bank v. United States, Ct. Cl. No. 9-75, decided June 16, 1976, slip op. 25.

APPENDIX E
UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
Washington, D.C. 20415

D E C I S I O N

IN THE MATTER OF)
)
) TYPE CASE: Removal
)
Mr. Luther G. Power, Jr.)

INTRODUCTION

The appellant appealed from the November 19, 1973, decision of the Commission's Dallas Regional Office, sustaining the agency's action removing the appellant effective September 18, 1972. At the time of the appellant's removal he was employed at the Red River Army Depot, Texarkana, Texas, in the position of Ammunition Inspector (Surveillance), GS-9.

STATEMENT OF THE CASE

By letter dated July 17, 1972, the agency informed the appellant that it was proposed to remove him based upon the charge of submitting false information for reimbursement of expenses incurred during an official transfer from Fort Wingate Army Depot,

Gallup, New Mexico, to Red River Army Depot, Texarkana, Texas. Four specifications (a through d) outlined the specifics of the infractions in support of the basic reason for tne adverse action. The appellant replied to the notice of proposed adverse action in a letter dated August 9, 1972. Additionally, the appellant made an oral reply on August 31, 1972. By letter dated September 15, 1972, the appellant was advised that a decision had been reached to remove him from the service and that tnat decision was based upon the reason contained in the notice of proposed adverse action. As a result of the foregoing decision the appellant was removed from his position effective September 18, 1972.

The appellant filed an appeal with the Department of the Army which resulted in an agency hearing on November 28, 1972. By letter dated February 21, 1973, the Commander, Red River Army Depot, Texarkana, Texas, issued his decision which sustained the appellant's removal. The appellant appealed that decision to the Commission's Dallas Regional Office.

FIRST LEVEL DECISION

The Regional Office found that the agency had complied with the procedural requirements of Part 752, Subpart B, of the Civil Service regulations in effecting tne removal of the appellant. As to the

merits, the Regional Office found that the appellant's removal was for such cause as to improve the efficiency of the service and affirmed the action of the agency.

REPRESENTATIONS TO THE BOARD OF APPEALS AND REVIEW

On appeal to the Board the appellant raised a variety of contentions which depicted the agency's action as one which did not take into account his training and expertise which had cost the agency over $20,000; that the agency refused to let him withdraw his expense voucher after the investigation began; that the information appearing on the travel voucher was an administrative error; and that much of his representations had been left out or distorted.

The appellant continued his representations by making point by point objections to the Commission's Regional Office decision and offered a voluminous amount of additional information which he alleged had a bearing on the action taken. All representations submitted by appellant were exchanged with the agency and no rebuttals were forthcoming as a result of that exchange. The Board has carefully considered all of the appellant's contentions in adjudicating his appeal notwithstanding the fact that many of his observations were foreign to the issues on appeal.

ANALYSIS AND FINDINGS

The Board finds, as did the Regional Office, that the agency complied with the law and the Civil Service regulations in effecting the removal of the appellant. As to the merits, the Board is concerned about the appellant's obvious desire to mitigate the seriousness of the charges levied against him through unsubstantiated innuendoes which were not dealt with in detail in the Regional Office decision. In the Board's opinion the Regional Office function with respect to the appellant's appeal was to weigh the relevancy of the evidence presented and to reach a conclusion as to whether the reasons relied on by the agency were sufficient to support its action by substantial evidence. This is not to say that the resume submitted by appellant, which took exception to the Commission's hearing, was not considered; rather, it indicated that the relevancy of that information was found not to be of sufficient substance to warrant its inclusion in the Regional Office summary of the hearing or its findings and recommendations.

The Board has reviewed the appellant's resume of the Civil Service Commissioner's hearing and finds that the appellant objected to the appeals examiner's rulings which denied him opportunities to include or duplicate information which he felt was relevant to the issue in his case. The Board is

not convinced that this information and other allegations raised in appellant's resume are matters which could be considered as a valid defense.

The evidence of record establishes that appellant submitted an expense voucher containing information which could not be substantiated. The record further shows that the agency's investigation produced overwhelming and substantial evidence to establish that the travel voucher was knowingly submitted by appellant containing false entries.

The Board finds that the foregoing is the central issue in this case and the fact that appellant was not allowed to correct his voucher based upon the contention that the false information was the result of an administrative error is not controlling. Further, the Board has determined that the other issues and contentions raised by appellant on appeal either have no merit or were disposed of in the Regional Office decision.

In view of the above, the Board concurs in the findings of the Regional Office which affirmed the removal action of the agency. The record has established that falsification did take place as alleged by the agency and the Board finds that the appellant's statements and allegations do not show facts and circumstances which would serve to excuse the act for which he was charged. The Board further finds that the agency's action was not

arbitrary, capricious, or unreasonable but was for such cause as will promote the efficiency of the service.

DECISION

The decision of the Regional Office is hereby affirmed.

As provided in Section 772.307(c) of the Civil Service regulations, the decision of the Board is final and there is no further right of administrative appeal.

For the Commissioners:

/s/ William P. Berzak
Chairman

April 5, 1974